

FEDERAL MAGISTRATES COURT OF AUSTRALIA

BAI v MINISTER FOR IMMIGRATION & ANOR [2005] FMCA 1567

MIGRATION – Review of Migration Review Tribunal decision – procedural fairness – arguments as to how evidence will be received.

Migration Act 1958 (Cth)
Migration Regulations 1994 (Cth)

Abebe v Commonwealth of Australia [1999] HCA 14; (1999) 197 CLR 510
Gherga v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 351
Jian Xin Liu v Minister for Immigration & Multicultural Affairs [2001] FCA 1437
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration & Multicultural & Indigenous Affairs v Maltsin [2005] FCAFC 118
Minister for Immigration & Multicultural & Indigenous Affairs v SGJB [2003] FCAFC 290
Minister for Immigration & Multicultural & Indigenous Affairs v SZAYW [2005] FCAFC 154
NDEGWA v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FMCA 74
Rahman v Minister for Immigration & Multicultural Affairs [2000] FCA1277
SBBA v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 90
Tran v Minister for Immigration & Multicultural Affairs [2002] FCA 1522

Applicant:	XUE MEI BAI
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG959 of 2004

Judgment of: Riethmuller FM
Hearing dates: 8 & 10 March & 12 September 2005

Date of Last Submission: 12 September 2005

Delivered at: Melbourne

Delivered on: 28 October 2005

REPRESENTATION

Counsel for the Applicant: Ms Frederico

Solicitors for the Applicant: Wayne Wong & Associates

Counsel for the Respondents: Ms Moore

Solicitors for the Respondents: Clayton Utz

ORDERS

- (1) That the application be dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG959 of 2004

XUE MAI BAI
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
First Respondent

And

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This judgment arises from an application filed on 22 July 2005 seeking judicial review of a decision of the Migration Review Tribunal on 21 June 2004 affirming a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to refuse to grant a Partner (Migrant)(Class BC) visa.
2. The applicant is a 49 year old female citizen of China. The applicant's nominator is her husband Mr John Teoh. Mr Teoh is 72 years old and an Australian citizen.
3. The applicant and Mr Teoh were introduced to each other by a relative of the applicant who lives in Victoria. The applicant said that she and

Mr Teoh spoke twice on the telephone to each other following which on 21 April 1997 Mr Teoh visited the applicant in China. The next day, 22 April 1997, they were married in Jiangmen City, Guang-dong Province, China. Mr Teoh returned to Australia on 19 May 1997 and the applicant remained in China.

4. Both the applicant and Mr Teoh had been previously married. The applicant's first husband, Dang Hal Ye, died in 1995. Mr Teoh and his first wife, Koo Lan Chang (known as Lily Lee) obtained a decree nisi of dissolution of their marriage from the Family Court of Australia at Melbourne on 27 April 1992. However, Mr Teoh continued to live at the same address as Ms Lee until at least 13 February 2001, some four years after his marriage to the applicant and three months prior to her arrival in Australia. The Tribunal in its reasons notes that upon his return to Australia on 19 May 1997, after his marriage to the applicant in the Peoples Republic of China, Mr Teoh travelled with his first wife.
5. On 5 June 1997 the applicant applied offshore for a Partner Visa on the basis of being a spouse of Mr Teoh. This application was refused on 26 November 1997.
6. On 24 January 2000 the applicant lodged another offshore application.
7. The applicant was interviewed by a delegate of the respondent in China on 11 August 2000. The Tribunal found that during this interview the applicant was unable to provide the name of the nominator's daughter, how long he had been in Australia, the names of the persons he lived with, or details of his previous marriage, his job, hobbies or financial situation.
8. On 19 December 2000 a delegate contacted Mr Teoh by telephone to ascertain details of the parties' relationship. The Tribunal's recounts that Mr Teoh advised that his former wife was still living with him in a separate bedroom as she was elderly and ill and required his care but that when the applicant arrived in Australia they would move to another residence and his former wife would go into a nursing home.
9. On 12 March 2001 the Department granted the applicant a Spouse (Provisional) (Class UF) subclass 309 visa. The applicant arrived in

Australia on 5 April 2001 and said that she commenced to live with Mr Teoh at Heidelberg West, Victoria.

10. On 21 August 2002 Mr Teoh made a statutory declaration in respect of the applicant's application to remain permanently in Australia as his spouse. In that statutory declaration Mr Teoh claimed that he and the applicant were living as husband and wife and that they often attended social functions together as husband and wife. A statutory declaration in identical terms was made by the applicant on the same day. The applicant also filed two other statutory declarations by supporting witnesses in support of her permanent visa application.
11. On 14 July 2003 a delegate of the respondent separately interviewed the applicant and Mr Teoh in relation to the applicant's visa application. At that interview the delegate discussed with both parties concerns that had arisen as to the genuineness of their spousal relationship. In particular the delegate asked both parties to comment on a number of discrepancies in their claim that arose as a result of simultaneous house visits on 13 May 2003 by the Department to a property at Doncaster East and the Heidelberg address. It had been the view of the Department that the nominator was residing at the Doncaster address with his ex wife and that he and the applicant did not live together as husband and wife at the Heidelberg address as claimed in her visa application.
12. The Tribunal recounts in its reasons (at [19]) that at that interview the applicant stated that Mr Teoh spent a lot of time at the Doncaster address to help his former wife and that he hardly ever stayed there but would have a change of clothes there. In that interview Mr Teoh stated that his former wife's illness became very serious in the last 2-3 years. Mr Teoh explained that the reason his clothes were kept in the bedroom of his former wife was that she did his washing and ironing for him and that the reason he had received correspondence addressed to him at the Doncaster address was that many of his documents were sent to that address and that as he went there regularly and he had not bothered to change his address.
13. On 9 December 2003 the delegate refused the applicant's application on the basis that the applicant did not meet the requirements of subclause 100.1221(2) because the delegate was not satisfied that the

applicant was the spouse of the nominator. The delegate found that Mr Teoh and his first wife were still in a spousal relationship, that his commitment to her was exclusive and ongoing, that Mr Teoh and the applicant did not live together on a genuine domestic basis, that the evidence that Mr Teoh lived with his first wife outweighed all evidence that he lived with the applicant, and that it appeared that the relationship between the applicant and Mr Teoh had been organised and contrived for the purpose of obtaining for the applicant permanent residency in Australia.

14. On 23 December 2003 the applicant lodged an application for review of the delegate's decision with the Tribunal.
15. On 1 April 2004 the Tribunal wrote to the applicant and invited her to appear before the Tribunal to give evidence and present arguments relating to issues arising in relation to her application for review. On 20 April 2004 the applicant advised the Tribunal in writing that she would appear at the hearing and requested the Tribunal take oral evidence from the nominator and Mr Li. On 27 April 2004 the applicant's legal representative requested that the Tribunal also take oral evidence from Mr Lai.
16. The Tribunal held a hearing on 29 April 2004. The applicant and Mr Teoh gave oral evidence as well as two other witnesses – Mrs McNamara (next door neighbour at the Heidelberg address) and Mr Li (a relative of the applicant).
17. The Tribunal decided to affirm the delegate's decision under review, finding that the applicant was not entitled to the grant of a Partner (Migrant) (Class BC) visa.
18. On 22 July 2004 the applicant filed an application for review with this Court. An amended application was subsequently filed on 3 December 2004.
19. The application ultimately related to the following issues that were pursued at the hearing:
 - a) That the Migration Review Tribunal ('the Tribunal') fell into jurisdictional error by not finding that the applicant and the nominator were in a married relationship as defined by regulation

1.15A(1A) on the basis that the Tribunal imposed its own opinion. This ground effectively dealt with the interpretation of regulation 1.15(1A).

- b) That the Tribunal failed to take into account the evidence of the applicant's neighbour, Mrs McNamara.
- c) That the Tribunal imposed its own opinion when it referred to the evidence of a medical report by Dr Choo at paragraph 44 of its decision and the evidence of Mr Li at paragraph 47.
- d) That the Tribunal failed to address the statutory declaration of Mr Huang.
- e) That the Tribunal failed to ask Mr Li appropriate questions during the hearing.
- f) That the Tribunal failed to accord the applicant procedural fairness with respect to the witness Mr Lai.

Ground 1

20. This ground concerns the interpretation of regulation 1.15A which is in the following terms:

(1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and

(b) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis.

...

(3) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:*

(ad) a Partner (Migrant) (Class BC) visa; or

(ae) a Partner (Provisional) (Class UF) visa; or

(af) a Partner (Residence) (Class BS) visa; or

(ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one party to the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

(i) any joint responsibility for care and support of children, if any; and

(ii) the parties' living arrangements; and

(iii) any sharing of responsibility for housework;

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;

- (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
- (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

21. It was submitted on behalf of the applicant that when considering regulation 1.15A that the Tribunal had erred in not concluding that it was possible for the nominator to have a genuine spousal relationship with the applicant and to continue to care for his former wife. The applicant took issue with the finding of the Tribunal at paragraph 50 that there was strong evidence to suggest that the nominator was still involved:

...in what might fairly be described as a spousal relationship with his former wife.

22. It was argued that there was no evidence of this, however the remainder of paragraphs 50 through 52 set out the substance of the evidence relied upon by the Tribunal. The Tribunal said:

50. *There is strong evidence to suggest that the nominator is still involved in what might fairly be described as a spousal relationship with his former wife. He was contacted by an officer of the Department in February 2002, almost 5 years after his marriage to the visa applicant, and advised he had continued living with his former wife after their divorce in order to look after her. The home visit by the Departmental officers suggests that he continues to live with her. Departmental records show that the nominator and his*

former wife travelled together on a number of occasions since his marriage to the visa applicant.

51. *The visa applicant did not know about the review applicant's hypertension or the reason he stopped working and became a pensioner. The parties displayed some affection towards one another, but showed only a rudimentary knowledge of each other's interests and circumstances, especially when it is considered that they have been acquainted for fourteen years, and married for seven. There is very limited evidence of telephone contact, and the Tribunal has no knowledge of the contents of the few (relative to the duration of the relationship) envelopes that the parties have provided. Their plans for the future were similarly vaguely drawn. The Tribunal is not satisfied that the parties are committed to each other to the exclusion of others, or that they provide one another with emotional support or companionship.*
52. *The Tribunal accepts that the available evidence points to the existence of an association between the parties that may have involved periods of cohabitation and the occasional provision of financial support. However, the Tribunal considers that regulation 1.15A defines a spousal relationship in terms that clearly contemplate something more substantial and exclusive than the relationship that has been described by the parties, which more closely approximates the relationship between a man and his mistress than a marriage, and after careful consideration concludes that the totality of the evidence does not support the spousal relationship or degree of commitment claimed by the parties and required by the Regulations.*
23. It appears to me that the decision was entirely a question of fact for the Tribunal to consider within the factual matrix of the particular case: that is whether or not Regulation 1.15A(1A) has been satisfied. The matters considered by the Tribunal in this regard were clearly relevant and appropriate matters. It cannot be said that any of the matters referred to were irrelevant. There do not appear to be any other significant matters that the Tribunal has not had regard to.
24. The applicant relied on a decision by O'Dwyer FM in *NDEGWA v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FMCA 74 where his Honour considered the same regulation. His Honour said:

7. *The Applicant also contended that the Tribunal had asked itself the wrong question when it considered the “degree of commitment” as opposed to the mutuality of that commitment to the exclusion of all others. It is apparent from the language used by the Tribunal that it was concerned with the degree of commitment whereas reg.1.15A(1A)(b)(i) requires a consideration of mutuality. In addressing itself to the question of degree the Tribunal has erred in that it did ask itself the wrong question and failed to consider, as required, the question of mutual commitment. In so doing, the Tribunal has fallen into jurisdictional error.*

25. I am mindful that the reasons of an administrative decision-maker should not be scrutinized in an over zealous fashion in order to glean some inadequacy in the way the reasons are expressed: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. In cases such as this, the decision as a whole must be read having regard to the issues the particular case raises. In this case the Tribunal does not appear to have strayed from considering whether or not the parties have an appropriate mutual commitment to the exclusion of all others, to a consideration of the degree of their commitment and therefore the decision does not appear to assist the applicant. In coming to my decision on this aspect of the case I am not persuaded that the use of the phrase ‘degree of commitment’ in the context of the considerations set out in the decision shows that the tribunal member erred in their considerations. To the extent that the decision of O'Dwyer FM deals with this area it is, in my view, distinguishable from this case.

26. This is not to say that a genuine marriage could not subsist in a variety of circumstances which are not easily categorised in a traditional way: see *Jian Xin Liu v Minister for Immigration & Multicultural Affairs* [2001] FCA 1437. However, that is not the issue that the Tribunal had to deal with in this case. The issue here was whether or not the applicant and the nominator were in a genuine and continuing relationship, and whether they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal was not so satisfied.

Ground 2

27. This ground relates to the evidence of Mrs McNamara. Mrs McNamara was the next door neighbour of the applicant. The transcript of her evidence at the Tribunal hearing was tendered at the hearing.
28. The evidence of Mrs McNamara is set out in the transcript in the following terms:

MR YOUNG: Right. Well, Mrs McNamara has joined us at the table. What is your relationship with - - -

MRS McNAMARA: A neighbour.

MR. YOUNG: Your neighbour. So you are a neighbour in Heidelberg?

MRS McNAMARA: Yes, in Marobe Street, 47, he is my next door neighbour.

MR YOUNG: Okay. So how long have you known them?

MRS McNAMARA: Since they moved in, about 2-1/2 years ago, or whatever it is. I have been there 4 years - would have been here 4 years November this year.

MR YOUNG: Right.

MRS McNAMARA: I was one of the first ones. He came along a bit later.

MR YOUNG: Okay, this is a new ---

MRS McNAMARA: New estate. They pulled the Housing Commission houses down in West Heidelberg and built all these new housing.

MR YOUNG: Yes, yes.

MRS McNAMARA: And they went broke.

MR YOUNG: Well hopefully it didn't affect you badly - - -

MRS McNAMARA: You have probably had some sources in - your solicitors had a bit of a field day, I think.

MR YOUNG: The less said about solicitors - okay, it is a new estate, you came about 2-1/2 years ago, so how often would you see them?

MRS McNAMARA: Daily, weekly, any time. Yes. Well, they - because I'm in the - I am in Rowe Street and they are in a - they have to drive down at the side - back side of my place - --

MR YOUNG: The side of your place to get to theirs.

MRS McNAMARA: Yes, so - and they are not in the main street.

MR YOUNG: Right.

MRS McNAMARA: They are in - so, on a daily basis, or anything. Used to go and see them walking and wave to them, for years, and then they realised I wasn't such a bad person they used to smile.

MR YOUNG: Right. So when you over 2-1/2 years you say, daily, weekly, any time - - -

MRS McNAMARA: Yes.

MR YOUNG: I mean - - -

MRS McNAMARA: There wasn't any - - -

MR YOUNG: - - - how often - sorry, are you a retired person?

MRS McNAMARA: Yes.

MR YOUNG: Okay.

MRS McNAMARA: I am an old person.

MR. YOUNG: Right, I have just said retired. So in what context would you see them. I mean are we talking walking past, or you visiting them or them coming in for a cuppa?

MRS McNAMARA: Well, in the last few - since my husband passed away and I have been by myself they have asked me in and I go to their place and we have had - and they have been in and come and sat down and realised that, you know, it is all right to go and visit people and - - -

TAPE MALFUNCTION

MR YOUNG: Have you visited them?

MRS McNAMARA: Yes, had a meal and they - they are quite nice meals actually. Apparently they are - that is one of their fortes, I think, isn't it, of food.

MR YOUNG: Well, she works in a kitchen, I imagine Mrs Teoh would be good. So - you know, I am still trying to get some sense here of how often you would see them, and in what context. I mean, you are a neighbour, okay, you have retired, but they are living clown the back of the house and - - -

MRS McNAMARA: Yes, but they have to drive past and then they go for walks so I see them three or four times a week walking around the streets, which they do a lot, apparently, they are very fit people, not like me, I drive everywhere.

MR YOUNG: Right

MRS McNAMARA: I live near Northland and I should walk but I drive, but they walk everywhere, and they have made me some nice things and dropped them in, knock on the door and say, "Would you like this" and I always say, "Yes."

MR YOUNG: Right, right. Three to four times a week over what, 2-1/2 years?

MRS McNAMARA: Yes. Well, whenever they - I remember when they moved it, I don't know what date, I didn't know - didn't take any - - -

MR YOUNG: No, I am not asking you to recall the date, I am simply a little surprised, even with a retired person, that you would see someone that often when Mr Teoh was working as a migration - as an officer for, you know, much of that time.

MRS McNAMARA: Right, yes.

MR YOUNG: I am not doubting - I am just surprised.

MRS McNAMARA: No, no, yes.

MR YOUNG: I just want to be clear on this. People often remember the more recent incidents and the rest becomes a bit hazy beyond that, so over 2-1/2 years, I mean for the first, say, 6 months they were there, did you see much of them?

MRS McNAMARA: Well, no, I didn't see a lot of them, as I say, until, you know, when my husband died would have been two years this May, I used to - my husband knew - would sit out on

our front - we had a front thing and we would sit out there often and if they drove past, you know, we would wave and things like that. And - but my husband wasn't well so he wasn't an active person - - -

MR YOUNG: Sure.

MRS McNAMARA: - - - so I was the one who always made the first, you know, hellos and things.

MR YOUNG: Okay, okay. So for the first 6 months or so they were there, that was the last 6 months of your husband's life, is that roughly right? Your husband died 2 years ago?

MRS McNAMARA: Yes, 2 years ago this May, yes.

MR YOUNG: Okay. So about 2-1/2 years you were there. All right, so for the first 6 months or so they were there you say you didn't see much of them?

MRS McNAMARA: No, well I didn't - I didn't sort of get out much, he needed a lot of attention, but whenever I saw them I was only too pleased to smile.

MR YOUNG: Okay. And would they - so did you ever see Mr Teoh's on her own walking up and down, I mean, were they always together?

MRS McNAMARA: No, no, they weren't locked together or anything like that.

MR YOUNG: No, no. So, well going back, you have seen them a couple of times, was it 3 or 4 times a week walking past---

MRS McNAMARA: Yes

MR YOUNG: So, how often would you see Mr Teoh?

MRS McNAMARA: Oh - - -

MR YOUNG: Do you understand the importance of my question?

MRS McNAMARA: Yes, I am trying to work it precise.

MR YOUNG: I know, it is not something people normally think about, but on this occasion I have to think about it.

MRS McNAMARA: Yes, and I have to - well, let us see, I was always aware that he was there and he was always pleasant and - but I didn't know that I had to sort of- -

MR YOUNG: Let me say, I am not asking you lures questions, I am really not trying to trip you up, and I am sorry about persisting with this, but you say now, you were always aware he was there. What do you mean by that?

MRS McNAMARA: Well, he had to go to - because they lived at the side of me they weren't beside me, they would have to come and I would hear the car go down and my - my back family room there - their house is right at the back of my house so I would always be aware there was lights on and I would hear noise and laughter and things like that.

MR YOUNG: Okay. Right. But noise and laughter can emanate from all sorts of people including television sets and - -

MRS McNAMARA: Yes, I know, but I would see them, you know, and see people come and go. I wouldn't go and peep out the window and think, what are they doing now.

MR YOUNG: No, I am not suggesting that you were, or should have, I am - but really, your role as a witness here today, as [applicant's solicitor] will explain, is to help me understand how much time Mr Teoh, in particular, spent there. We know Ms Bai lives there - -

MRS McNAMARA: Yes.

MR YOUNG: - - - but the question was about Mr Teoh. So, basically, you saw them on - -

MRS McNAMARA: I knew there was three people living there. Well, I saw those people but I didn't know at the time who they were or what their relationships or anything were. I just treated them like neighbours.

MR YOUNG: Sorry if this sounds a bit like - like CSI or some terrible token, but how often, and did - how often over these 2-1/2 years have you positively identified Mr Teoh?

MRS MCNAMARA: Oh - -

MR YOUNG: Well, you have said you have heard laughter and you were aware there were people there - -

MRS McNAMARA: No, no I used to see them and he would always - he would always smile, and then he would wave and then he would - - -

MR YOUNG: I am in no doubt he smiled and waved - - -

MRS McNAMARA: Yes.

MR YOUNG: - - - I am trying - Mrs McNamara, I am trying to understand how often over the 2-1/2 odd years did you positively identify Mr Teoh being there. No laughter, not the sound of a TV, not Mrs Bai driving past - - -

MRS McNAMARA: Right, yes.

MR YOUNG: - - - not the sound of cars in the night, but that gentleman there - - -

MRS McNAMARA: Yes.

MR YOUNG: - - - do you actually sight him?

MRS McNAMARA: Yes, yes.

MR YOUNG: How often? I know it is a difficult question but I really would ask you this?

MRS McNAMARA: All right, to think hard about it, hard and long, right.

MR YOUNG: If you can't recall - - -

MRS McNAMARA: Two, three times - - -

MR YOUNG: - - - I mean, it is okay to say you can't recall if you don't, I am not really trying to push you with your answer - -

MRS McNAMARA: No, no.

MR YOUNG: - - - one way or the other.

MRS McNAMARA: On a regular basis of weekly, daily or whenever - whenever I saw him, if it was, you know, every second day or third day, I was aware that he was there and that he must have lived there because he drove there and didn't come out again and - - -

MR YOUNG: Regularly, weekly, daily, whatever, right. Well, I - yes, okay. I accept that it is very difficult, in the circumstances, to put the times precisely on it, but - - -

MRS McNAMARA: Yes, yes.

MR. YOUNG: - - - you are aware from the context of these proceedings what this is all about - - -

MRS McNAMARA: Yes

MR YOUNG: - - - and that - but, that doesn't help me very much. It certainly establishes that he went there, I am not saying in any way - in any way, disbelieving you, Mrs McNamara - - -

MRS McNAMARA: No.

MR YOUNG: - - - because I - it is a problem about your recollection - - -

MRS McNAMARA: Yes.

MR YOUNG: - - - and about your observation. Obviously, you are not a nosy neighbour - - -

MRS McNAMARA: No.

MR YOUNG: - - - you weren't hanging out the window watching and photographing.

MRS McNAMARA: No, no.

MR YOUNG: - - - but it would be - - -

MRS McNAMARA: Well, because he is of a different culture, we weren't as friendly with him as we were the other Aussies - Aussie people.

MR YOUNG: Sure, no, I understand that. I take nothing adverse in that, nor does my colleague, [the applicant's solicitor], no, I understand that. You would be more conscious and have more contact with them. You would have more - -

MRS McNAMARA: That is right.

MR YOUNG: I understand that - - -

MRS McNAMARA: Yes.

MR YOUNG: - - - So I am not in any way being - - -

MRS McNAMARA: Yes, well if they had have moved in at the same time as we did, but he came later, we moved in - we were the staunch ones and we were the Aussies and, you know, we would wave and hello and that was it.

MR YOUNG: Okay. And took you a while to get to know them.

MRS McNAMARA: Yes.

MR YOUNG: That is fine. That is fine. Okay. Thank you. Okay, is there anything else you would like to say. We have got – actually, we have about five minutes left, so I presume, [Applicant's solicitor], you would like to Wei Xiong Li, you would like a word, yes.

SOLICITOR: Yes, yes.

MR YOUNG: Look, thank you very much, Mrs McNamara. Thank you for that.

MRS McNAMARA: Will I stay or go.

MR YOUNG: No, please, have a seat, have a seat.

29. The findings that the Tribunal made with respect to Mrs McNamara's evidence are set out in paragraph 46 in the following terms:

46. The Tribunal was told by Mrs McNamara that she saw the review applicant at the Heidelberg property frequently, but on being questioned closely, betrayed some uncertainty exactly how often she had seen or heard them there together, whether she had heard the parties' or some other people's voices, or even whether she had heard the television set. She said that she saw their car passing her window as they drove to the rear of the property, but was uncertain who was driving or whether the parties were both in the car; because she was a good neighbour and did not make a habit of peering out at them. Whilst not doubting Mrs McNamara's integrity, the Tribunal was of the view that her confidence that the review applicant resided at the Heidelberg address was based upon supposition and inference, rather than direct observation, and therefore gives it limited weight.

30. It appears to me to be clear that the Tribunal had to make an assessment of the evidence of Mrs McNamara and determine what weight it placed upon that evidence. Her evidence was circumstantial evidence of residence at the premises in the sense that she could only

observe people coming and going. The Tribunal ultimately concluded that it could give it limited weight in the circumstances. This is clearly a finding of fact by the Tribunal, and the type of finding that was open to the Tribunal. It does not demonstrate an error reviewable by judicial review nor, in my view, would it demonstrate an error that could be the subject of successful appeal even if this Court were rehearing the application. I therefore find that the applicant fails on this ground.

Ground 3

31. This ground relates to the evidence of Dr Choo and the Tribunal's comments with respect to the evidence of Dr Choo. The tribunal found:

44. *The nominator claims to maintain an office at his ex-wife's residence, and that he often stays there to look after his former wife pursuant to an undertaking that he gave at the time he divorced her. He has provided evidence that his ex-wife is in poor health, but none to support his contention that she has no-one else to support her, save a statement by her doctor that the review applicant gave an undertaking that he would do so after their divorce. It is unclear to the Tribunal how a family doctor would be in a position to know of such an undertaking between a husband and wife, and the Tribunal accordingly gives the doctor's statement limited weight. Moreover, this undertaking, and the review applicant's claimed actions pursuant to it – travelling overseas together, maintaining a substantial collection of clothes in his ex-wife's bedroom, having mail addressed to her home and storing personal documents there, staying overnight and maintaining an office at her home for a significant rental, even after ceasing to practice as a migration agent - call into question the exclusive nature of his claimed spousal relationship with the visa applicant.*

32. It appears to me to be clear that it is open to the Tribunal to make such a finding with respect to Dr Choo's evidence. There is no proper evidentiary foundation laid for how it is that Dr Choo would know of the matters that he speaks of in his letter. It is no part of the Tribunal's function to make out the applicant's case for her: see for example *Abebe v Commonwealth of Australia* [1999] HCA 14; (1999) 197 CLR 510; *Tran v Minister for Immigration & Multicultural Affairs* [2002]

FCA 1522 at [25]; *Rahman v Minister for Immigration & Multicultural Affairs* [2000] FCA 1277; and, more recently, see *SBBA v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 90 at [8].

33. In the written submissions of the applicant it is also alleged that the Tribunal failed to consider a large number of relevant items enumerated from (i) to (vii). Save for the matters referred to in (v) of this paragraph all of these matters appear to be argument as to the factual findings of the Tribunal and the substance of them can be found addressed in the reasons that the Tribunal gave.
34. The allegation in (v) that the Tribunal failed to take into account the evidence of a significant witness, Mr Kevin Andrews MP, ignores the nature of the letter from Mr Andrews to the Tribunal which was appropriately responded to at the time. Mr Andrews was clearly recounting what he has been told, as can be seen from the face of the letter where he states:

He has assured me that he and Ms Bai have a good marriage and she understands that he feels obligated to provide care and friendship to his former wife.

I would be grateful if you would give every consideration to this application.

35. Mr Andrews is not, in that letter, seeking to provide anything more to the Tribunal than an outline of the circumstances that he has been told of and a request that the Tribunal give proper consideration to the application. It was not evidence in the case. It is not such a significant matter that the Tribunal has erred at law in failing to refer to it in their decision.

Ground 4

36. The next ground relied upon was that the Tribunal had failed to take into account the evidence given by Mr Huang.
37. At paragraph [16] of the Tribunal's decision, the Tribunal recounts that a statement from Mr Huang, the son of the visa applicant's cousin, dated August 2002 was taken into account as part of the evidence. Mr

Huang was not called as a witness before the Tribunal, as is clear from the request for hearing form completed by the applicant (Court Book page 180, and 182).

38. The fact that the particular evidence did not receive more detailed treatment in the reasons does not appear to me to show that the tribunal member failed to have regard to it, in the context of this case.
39. I see no judicially reviewable error in this regard.

Ground 5

40. It was argued that the tribunal member ought to have questioned Mr Li in more detail with respect to his evidence.
41. Mr Li stated that he visited the applicant and the nominator often. The member asked a leading question, presuming that the visits were on weekends (which would have been in accord with the evidence of the applicant's work arrangements). The witness advised this was not the case, but that he visited on his days off. The witness said he was a shift worker.
42. Not surprisingly, the tribunal member found this evidence difficult to reconcile with other evidence that the applicant worked long hours and rarely had a day off.
43. It was argued that the member ought to have sought further evidence to clarify if Mr Li may have visited at times when the applicant was present.
44. It is not a requirement of procedural fairness that the tribunal member seek out evidence to assist the case of the applicant. In this case, however, the applicant's solicitor was present. It was open to the solicitor to raise this issue at the hearing, by way of a request that the witness provide further evidence to add to or clarify his version. This was not done.
45. I am not satisfied that this ground is made out.

Ground 6

46. The final ground related to the evidence of Mr Lai. It was alleged that the process of dealing with the evidence of Mr Lai did not fulfil the requirements of procedural fairness.
47. There was considerable confusion with respect to two witnesses, Mr Li and Mr Lai. The applicant's contentions of Fact and Law filed on 3 December 2004 and expanded upon in amended contentions filed 20 December 2004 (both filed by the applicant's solicitor) alleged:
- a) That Mr Lai gave evidence, but was not asked the correct questions by the member; and
 - b) That Mr Lai was wrongly referred to as Mr Li by the tribunal member in the decision.
48. The confusion with respect to Mr Lai and Mr Li was added to by the supplementary court book transcript which was not prepared by an experienced court transcription service. This was later replaced with a reliable transcript by an experienced transcription service.
49. After counsel for the applicant was pressed by me during argument to clarify with her solicitor the issues about Mr Li and Mr Lai counsel took instructions and stated that Mr Li was correctly referred to, having not only provided a statement but appeared before the Tribunal giving some brief evidence (see FMC hearing transcript of 8 March 2005 at P-36 to P-39; MRT transcript pages 37 to 40 and para [36] of the tribunal's decision).
50. The written evidence of Mr Lai is very brief, and appears at page 161 of the Court Book. It is in the following terms:

Mr J Teoh and Xue Mei Bai are husband and wife living together since 3 years ago.

I known them in fact two year before they were married.

My wife and myself regularly visit them at their home.

They are nice people. My family enjoy associating with them.

51. Despite the considerable confusion about the matter, it appears from the material that it was Mr Lai that was referred to in discussions at the end of the transcript of the MRT hearing. The transcript, on its face (at page 40 and 41.5), indicates that Mr Lai did not actually attend, following which there was some discussion between the applicant's solicitor and the Tribunal member as to the importance of having the witness (Mr Lai) attend in person. The hearing was ultimately concluded on the basis that the written statement would be considered the evidence given by that witness (see transcript page 41.34).

Did Mr Lai attend the tribunal hearing?

52. A careful review of the transcript indicates that in discussions on pages 2 and 3 the Tribunal member refers to there being four witnesses. A Tribunal officer, at page 2, said to the Tribunal member:

I will just explain, sir, that some of the witnesses are coming late so they have changed seating positions, they have actually – the late comers come down this end and the others moved down.

53. To the extent that the transcript lists three witnesses as being sworn this appears to be a reflection of the people who actually gave evidence later on the tape rather than a specific clear event that was recorded.
54. The recording, which was listened to in court, provides for the oath in English, followed by one voice which appears to be saying “yes, yes I do” and then the oath again in Cantonese followed by three voices, one of which says “I do” in Cantonese and the other two saying “I do” in English. Whether or not the person who says “yes, yes I do” is one of the three people that respond after the oath is given in Cantonese or not is unclear.
55. Upon reflection it appears to me that it is likely that there are four voices on the tape. This is in accord with the reference to four witnesses on pages 2 and 3 of the transcript. This is also in accordance with the evidence of Mr Lai, Mr Li and the solicitor.
56. The solicitor for the applicant, gave evidence that Mr Lai did attend. The solicitor’s evidence was contrary to an earlier version of the Statement of Facts and Contentions filed on behalf of the applicant by

the solicitor. The solicitor explained this by stating that the statement of facts and contentions was drawn by counsel and he didn't check it closely: this doesn't explain from where counsel obtained the earlier contrary view. I have some hesitation in relying upon the solicitor's evidence in these circumstances.

57. Mr Lai was called to give evidence. He said he attended and entered the hearing room at the commencement of the Tribunal hearing. He says he was asked to wait outside and says there were four witnesses to go in one by one. He doesn't recount being sworn in, as alleged by the solicitor. He says the only time he has met with the solicitor was that week before the hearing and today. He did recount that he sat next to Mr Li.
58. Mr Li was present and gave evidence that was in accord with that of the solicitor. Mr Li, however, said that he sat on the seat next to the wall with his wife and mother-in-law beside him. This is at variance with the evidence of Mr Lai.
59. Having had the opportunity to observe Mr Lai and Mr Li in the witness box I am not satisfied that they have a clear recollection of what occurred on that day, however I must also bear in mind that it was a day on which they were there only as witnesses and that their evidence was through an interpreter.
60. Ultimately, I accept that they did attend at the Tribunal on that day.

What occurred in the hearing with respect to Mr Lai's evidence?

61. The end of the proceedings is problematic. The transcript records as follows:

MR YOUNG: We are over time, but as a final courtesy, Ms Bai, is there anything you would like to say before you finish up?

THE INTERPRETER: No.

MR YOUNG: Okay. Thank you. I should be in a position to provide a decision within, on my present workload, three weeks, possibly two. If I have any further questions or either - I will send you a 359 notice or something of that nature.

SOLICITOR: I think there is a witness - - -

MR YOUNG: Well, we are - - -

SOLICITOR: We have got four witnesses, but no time, is it?

MR YOUNG: Well, we have run out of time. We had an hour and a half hearing - - -

SOLICITOR: All right, okay.

MR YOUNG: - - - the witness didn't show - but I mean, how important is his or her testimony. Was the general character - something - - -

SOLICITOR: Sir, it is his neighbour, also one of the neighbour of my clients. It is a neighbour.

MR YOUNG: Well, I mean, there are two options here, either we could forget about the neighbour or I could wait for you to get a deposition - get a stat dec or something of that nature. Would you like to do that?

SOLICITOR: Okay, yes, that is fine.

MR YOUNG: Well, I will hold the decision. Now, how long would you need, two weeks - a week?

SOLICITOR: Yes, I think he has already put in a - - -

MR YOUNG: All right, well if we have a stat dec - - -

SOLICITOR: It is not stat - it is only a statement.

MR YOUNG: this is the statement here.

SOLICITOR: Yes, I think you saw this one....

MR YOUNG: Yes, I have. Yes, I have got that.

SOLICITOR: Yes, that is the person who going toevidence.

MR YOUNG: That is fine. Well, let us consider the evidence given. Thank you.

SOLICITOR: Okay.

MR YOUNG: All right, thank you ladies and gentlemen.

62. It appears that the Tribunal member had erroneously thought that the last witness was not actually present (probably due to a comment made early in the proceedings). The tribunal member wished to end the hearing. On the versions that I have accepted above I find that the witness was present. However the solicitor does not appear to have advised the Tribunal member of this, or corrected his misapprehension. It is reasonable to expect that he would have told the Tribunal member if the witness was actually present. He did not do so. Having seen the solicitor give evidence in the witness box it seems to me that it is entirely possible that this was through nervousness or misplaced deference to the Tribunal member on the part of solicitor.
63. In any event it appears clear that the Tribunal and the solicitor reached an agreement that the evidence of Mr Lai would be considered as evidence given in terms of his witness statement.

Effect of the agreement to take Mr Lai's evidence as given

64. The decision about whether a party should rely upon a written statement or call a witness is a question that arises in many hearings and is ultimately a decision for the advocate or party presenting the case. It is not uncommon, when there is pressure of time or expense in cases, for parties to agree that some evidence in writing be provided to a court or tribunal without the witness being called or cross examined. Indeed this commonly happens with witnesses who are unlikely to be challenged (an obvious example being a DNA scientist with DNA test results).
65. This appears to be permissible under Part 5, Division 5 of the Migration Act. In *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* [2005] FCAFC 154 at paragraph [31] Weinberg J said:

31 *Moreover, the respondent's failure to object to the course adopted by the RRT, seems to me, in the context of this case, to give rise to the doctrine of waiver. The respondent was represented at the hearing. He sought to have his case heard by the same member as the other claimants. The procedure followed by the RRT was extraordinarily advantageous to him, and to the other claimants. There was no prejudice of any kind in what occurred. It is well established that a*

person can waive the right to full observance of what is described as "the hearing rule" if that is done voluntarily, and with knowledge of the entitlements waived: Escobar v Spindaleri (1986) 7 NSWLR 51 at 62. The inference that this is what occurred in the present case is one that I would be prepared to draw.

66. I find that it was open to the applicant, through her solicitor, to agree with the tribunal member to take this course.
67. Counsel for the Minister relied upon ss.362(2) and (3). The width of the operation of section 362(2) and (3) was considered by the Full Court in *Minister for Immigration & Multicultural & Indigenous Affairs v Maltsin* [2005] FCAFC 118 where Spender, Kenny and Lander JJ said:

52 That is, in this case, the Tribunal found that certain persons, some of whom who gave corroborative evidence, were deceitful, notwithstanding that the Tribunal found that Mr Maltsin and Ms Bogodist presented themselves as a couple to their friends (see [17] above) and at least one friend (Mr Conrad) was not permitted to give oral evidence. It was, of course, open to the Tribunal to determine the weight to be given to the letters and declarations to which it referred and to reject the corroborative evidence of friends and family on the basis that it rejected the evidence of Mr Maltsin and Ms Bogodist (always providing that jurisdictional error was not otherwise involved). It was, however, unfair in the circumstances to condemn as dishonest a group of individuals, some of whom had and some of whom had not prepared statements for the Tribunal, in circumstances where they had no chance at all to answer such at accusation, especially as the basis for the finding of dishonesty was not self-evident.

...

55. *As already noted, the appellant submitted that Mr Maltsin gave up any right to complain about the Tribunal's conduct in this regard because of what his representative said at the hearing and the fact that he did not make any complaint in the submissions filed on his behalf after the hearing. In some circumstances, the failure to make an early complaint may lead a court to conclude that there was no denial of procedural fairness. In the present case, however, the Tribunal also breached its obligation under s 362(3) of the*

Act; and an adverse finding about the proposed witnesses compounded this breach. Moreover, the Tribunal gave the clear impression in its conduct of the hearing that there would be no further opportunity to present evidence orally and its mind in this regard was made up. In the circumstances of the case, the appellant's submission must be rejected.

68. It does not appear to me that the situation in this case is akin to that in *Maltsin*. The Tribunal member discussed with the solicitor how to approach the evidence of this witness and offered to take the statement 'as evidence' in the matter, which offer was accepted by the solicitor. In these circumstances there does not appear to have been a formal decision imposed upon the applicant under s.362, rather an agreement reached as to how the hearing should be conducted with respect to this particular witness.
69. The Tribunal has neither declined to hear evidence, nor denied the applicant an opportunity to seek an adjournment to have that evidence.

Was the applicant denied procedural fairness?

70. It appears to me that the conduct of the Tribunal on this occasion left the applicant with the reasonable expectation that the Tribunal would take into account the evidence of Mr Lai. In the circumstances it can only be argued that the applicant was denied procedural fairness if the Tribunal member did not consider the material as part of the evidence, as agreed.
71. In order to consider whether or not the Tribunal has properly considered the evidence of Mr Lai one must turn to the relevant passages in the Tribunal's decision, which appear in paragraphs [23], [48], [49] and [52]:

23. *On 18 February 2004, the Tribunal wrote to the parties and their representative, inviting them pursuant to s359A of the Act to comment upon the delegate's comments pertaining to the home visits and the concerns they had raised in relation to the genuineness of the parties' claimed spousal relationship. In a letter dated 31 March 2004; the parties' representative lodged a submission (T1, F.66-69) in support of his clients' application, in which he responded to very few*

of the delegate's concerns and specific observations, essentially reiterating that the review applicant provided assistance and support to his ex wife because she was elderly and sick, and had travelled overseas with her only in order to seek medical treatment. He provided some medical reports about the review applicant's ex-wife's health problems together with a number of photographs of the parties and several statements of support.

...

48. *The visa applicant has provided a few statements of support and a small number of photographs of the parties together at a restaurant, and the parties - after much thought - could recall an outing to play the poker machines a few months prior to the hearing as their last social engagement together. No-one else accompanied them. There is no other evidence to suggest that the parties plan or undertake social activities together, or that they are recognised as a married couple. The review applicant has travelled overseas with his ex-wife on several occasions, but never with the visa applicant, who claimed that she was not granted any holidays. However, she is known to have travelled overseas with her cousin for three weeks in March 2003. The parties have travelled outside Australia independently of one another, but never together.*

49. *The parties have been married for almost 7 years, although there is little evidence to show that they have lived together since the visa applicant's arrival in Australia in April 2001. The visa applicant knew little about the nominator's activities on the day of the house visit, and expressed surprise when told he was at the Doncaster East residence. This ignorance, contrary to the parties' claims, was not an isolated occurrence arising from panic at the unheralded arrival of immigration officials, but was echoed in the parties' ignorance of one another's affairs and activities in a range of areas of their lives.*

...

52. *The Tribunal accepts that the available evidence points to the existence of an association between the parties that may have involved periods of cohabitation and the occasional provision of financial support. However, the Tribunal considers that regulation 1.15A defines a spousal relationship in terms that clearly contemplate something*

more substantial and exclusive than the relationship that has been described by the parties, which more closely approximates the relationship between a man and his mistress than a marriage, and after careful consideration concludes that the totality of the evidence does not support the spousal relationship or degree of commitment claimed by the parties and required by the Regulations.

72. In *Minister for Immigration & Multicultural & Indigenous Affairs v SGJB* [2003] FCAFC 290 the Full Court considered a situation where the tribunal member stated accepted a written statement, saying ‘I think he's already said what he needs to say in writing.’ The Full Court found that this resulted in the applicant being led to believe that the Tribunal ‘accepted the evidence of the witness as contained in the statement without the need for further elaboration’. I am not satisfied that the tribunal member’s statements in this case created an expectation that the evidence of Mr Lai would be accepted uncritically, nor that the witness’s evidence as to what he had observed would satisfy the tribunal of any of the particular facts in issue.
73. The applicant also relied upon the case of *Gherga v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 351 where Kiefel J considered circumstances where the conduct of the Tribunal member gave rise to an expectation by the solicitor acting for the applicant’s before the Tribunal that there was no need to hear further evidence with respect to the social aspects of a marriage, when viewed from the perspective of friends and acquaintances.
74. In this case it cannot be said that the Tribunal member misled the applicant’s solicitor or caused the solicitor to have an expectation that the Tribunal would do anything more than consider the written statement ‘as evidence’ given before the Tribunal. The decision to rely upon the written statement was not said to be based upon any particular expectation as to Tribunal’s views on an issue, nor did the exchange in the transcript provide any indication of any view of the tribunal member. The solicitor representing the applicant did not request that the witness be heard orally, but agreed to the course of relying upon the written evidence.
75. The evidence in the written statement of Mr Lai was very brief and in very general terms. The Tribunal referred to the letter enclosing Mr

Lai's statement (as recounted in the list of the statements that the Tribunal referred to in paragraph 23 of the decision). The findings of the tribunal are not necessarily inconsistent with the matters stated to by the witness, for similar reasons to those expressed by the Tribunal with respect to Ms McNamara. The tribunal did not mislead the applicant or her advisor by representing that the evidence in the statement would be uncritically accepted. In the context of this case, the issues and the findings, the very brief and general statement of Mr Lai does not appear to me to have required more specific discussion in the decision. I am not able to accept that the brief reference, in the context of this case, indicates that the tribunal ignored this piece of evidence.

76. In the circumstances I am not satisfied that:
- a) the tribunal member did not consider the evidence of Mr Lai;
 - b) the tribunal member was required to specifically recount or discuss Mr Lai's very brief evidence, in the context of the facts, issues and other evidence in this particular case; or
 - c) the findings of the tribunal member were outside the reasonable expectations that could have been generated by the course adopted with respect to Mr Lai's evidence at the hearing;
77. I therefore find that this ground is not made out.
78. I therefore dismiss the application as I have not found any of the grounds made out.

I certify that the preceding seventy-eight (78) paragraphs are a true copy of the reasons for judgment of Riethmuller FM

Associate:

Date: 28 October 2005